

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-379-E

IN RE:

**Enrique McMilion, Jr.,
Complainant/Petitioner,**

v.

**Duke Energy Carolinas, LLC,
Defendant/Respondent.**

**Duke Energy Carolinas, LLC's
Motion to Dismiss Complaint**

Pursuant to S.C. Code Ann. § 58-27-1990, S.C. Code Ann. Regs. 103-829 and 103-352, and applicable South Carolina law, respondent, Duke Energy Carolinas, LLC (“DEC” or the “Company”) hereby moves the Public Service Commission of South Carolina (“Commission”) to dismiss the above-captioned matter on the merits because the Complaint fails to adequately allege any violation of a Commission-jurisdictional statute or regulation, and a hearing in this case is not necessary for the protection of substantial rights. The Company also requests that the filing deadlines for all parties and the hearing date be held in abeyance until this motion is resolved.

In support of its motion to dismiss the Complaint, DEC shows the following:

BACKGROUND

Smart meters offer many benefits, including giving customers more information about how they use energy and providing increased convenience for customers.¹ Smart meters and other AMI

¹ Order No. 2016-791 at 1, Docket No. 2016-354-E (Nov. 17, 2016).

technology also lay the groundwork for programs that allow customers to stay better informed during outages, control their due dates, avoid deposits, be reconnected faster, and better understand and take control of their energy usage, and ultimately, their bills.² Acknowledging the benefits of smart meters, the Commission has required that its regulated investor-owned electric utilities make smart meters available to all customers, as well as implement a communications plan to inform all customers of the availability and capabilities of smart meters, and how customers may use those capabilities to better manage their power requirements.³ As noted in Appendix J of the 2016 South Carolina State Energy Plan, Advanced Metering Infrastructure (“AMI”) technology is not new to South Carolina. By 2016, each electric utility in South Carolina had installed at least some AMI meters, i.e., smart meters, and South Carolina’s electric cooperatives already had a 92 percent penetration of smart meters.⁴ The benefits available from the use of smart meters are substantial, and customers and their utilities are already beginning to realize those benefits.

The Company is in the process of deploying AMI to its customers in South Carolina, which includes the deployment of smart meters, as described in its October 10, 2016 filing in Docket No. 2016-354-E.⁵ The Company is now in the final stages of its smart meter deployment. Customers who objected to the installation of a smart meter were temporarily bypassed during the deployment and have continued to be served by automatic meter reading (“AMR”) meters. However, as more smart meters are deployed, routes for reading AMR meters are being discontinued. For that reason,

² Order No. 2016-489 at 2, Docket No. 2016-240-E (July 12, 2016).

³ Order No. 2007-618 at 4, Docket Nos. 2005-385-E and 2005-386-E (Aug. 30, 2007).

⁴ Office of Regulatory Staff, South Carolina State Energy Plan, Appendix J at 123 (2016).

⁵ The facts set forth in this motion are supported by the affidavit of Ted Allen, Senior Consumer Affairs Specialist at DEC. The affidavit is attached hereto as Exhibit A.

and to accommodate the limited number of customer concerns related to smart meter deployment, DEC proposed, and the Commission approved, the MRM Rider.⁶

Under the MRM Rider, rather than electricity usage being communicated to the Company via radio frequency, the meter is instead read manually by a meter reader physically visiting the service address. The meter reader manually collects only one number from the meter—the number on the customer’s register display. This collection is performed manually by the meter reader each month to calculate the customer’s usage. Although the meter collects electricity usage data that is more granular than total kWh usage, i.e., “interval data,” the Company does not retrieve this data from the meter under the MRM Rider. Further, the Company’s metering hardware has multiple integrated security measures, and the electricity usage information stored in the meter is encrypted. No customer-identifying information, such as names or addresses, is stored in the meters.

As part of the AMI deployment, DEC sent a postcard to each customer, including Mr. McMilion on February 16, 2017, containing notification that a smart meter would be installed at the customer’s service address. The form postcard is attached hereto as Exhibit B. Complainant called the Company and declined the installation of a smart meter, and the service address was temporarily bypassed for smart meter installation. A second notification was sent to Mr. McMilion on April 5, 2018 in the form of a letter explaining the option of obtaining electric service through a manually read meter and explaining the associated fees. The notification letter is attached hereto as Exhibit C. Additionally, for the customer’s reference, the approved MRM Rider tariff sheet was attached to the letter. The notification letter explained:

If you choose to opt out of having a smart meter installed, or if you already have a smart meter and wish to have it removed, you must enroll in the Manually Read

⁶ See Duke Energy Carolinas, LLC, Request for Approval of AMI Opt-Out Rider, Docket No. 2016-354-E (filed Oct. 10, 2016); Order No. 2016-791, Docket No. 2016-354-E (Nov. 17, 2016).

Meter program. To enroll, you'll need to call our Customer Care Center at 800.777.9898 within the next 30 days . . . to ensure that a manually read meter is set at your location.

According to the Company's records, Mr. McMilion did not respond or contact the Company within the specified 30 days, and the Company called Mr. McMilion on May 16, 2018. Mr. McMilion was informed that, should he not enroll in the MRM Rider, a smart meter would be installed at his service location. Mr. McMilion declined to enroll in the MRM Rider. The Company dispatched a bucket truck on July 19, 2018 to install a smart meter at Mr. McMilion's service address, but the Company's representative was turned away by Mr. McMilion. The Company called Mr. McMilion on July 19, 2018 to inform him of his options related to the MRM Rider, but Mr. McMilion again declined to enroll in the MRM Rider. The Company called Mr. McMilion on October 22, 2018 to attempt again to inform him of his options under the Company's MRM Rider, and Mr. McMilion again called the Company on November 27, 2018 about this issue.

Now that the Company is in the final stages of smart meter deployment, it is distributing letters to the remaining customers who have neither agreed to the installation of a smart meter nor enrolled in the MRM Rider. The form letter is attached hereto as Exhibit D. As explained in the letter, customers must enroll in the MRM Rider or permit the Company to install a smart meter. If the Company is unable to access its meter, service will be disconnected. This letter was mailed to Mr. McMilion on December 3, 2018.⁷ On the same day, Mr. McMilion called the Company and was informed that it could not grant him special consideration, and he filed the instant Complaint.

⁷ DEC filed a letter with the Commission on December 7, 2018 indicating that it would not exchange Mr. McMilion's meter or disconnect the power to his service address until the Commission has issued a final order or directive-order in this proceeding.

ARGUMENT

DEC requests that the Complaint be dismissed pursuant to S.C. Code Ann. § 58-27-1990, which allows the Commission to dismiss a complaint if it determines that “a hearing is not necessary in the public interest or for the protection of substantial rights.” The Complaint fails to adequately allege any violation of a Commission-jurisdictional statute or regulation, and a hearing in this case is not necessary for the protection of substantial rights.

I. The Company’s Collection of Electricity Usage Data Complies with South Carolina Law and Regulations

Although the allegations contained in the complaint are unsupported, it appears that Mr. McMilion’s allegations are based on the Company’s collection of electricity usage data through smart meters. While it is true that the Company’s smart meters transmit interval data to the Company, the utilization of smart meters has many benefits, as explained above, and the Company’s usage of smart meters complies with all applicable safety and regulatory requirements. Should a customer nevertheless have concerns about the Company’s collection of electricity usage information, the MRM Rider is an available alternative under which no interval data is retrieved. Indeed, the MRM Rider was specifically proposed in response to the limited customer concerns related to the utilization of smart meters.⁸ The Company has a statutory and regulatory duty to monthly collect meter data to determine its customers’ electricity usage, and this is precisely what the Company does under the MRM Rider. As explained above, under the MRM Rider, a meter reader collects only one number from the meter: the customer’s kWh register number. This collection is performed manually by the meter reader reading the kWh register number from the

⁸ See Duke Energy Carolinas, LLC’s Request for Approval of AMI Opt-Out Rider, Docket No. 2016-354-E (filed Oct. 10, 2016).

meter's visual display. No interval data is retrieved from the meter by the Company under the MRM Rider, nor could it be through this method.⁹

Moreover, Mr. McMilion points to no Commission-jurisdictional statute or regulation that would impair the Company's ability to collect its customers' electricity usage. Indeed, S.C. Code Ann. Reg. 103-321 requires that "meters shall be read and bills rendered on a monthly basis not less than twenty-eight days nor more than thirty-four days." Further, S.C. Code Ann. Reg. 103-320 requires that service "be measured by meters furnished by the electrical utility unless otherwise ordered by the commission" The Company has complied and continues to comply with these regulations. The Company no longer supports the use of analog electromechanical meters, and customers who are adverse to the installation of a smart meter have been informed of the availability of the MRM Rider. Mr. McMilion has been personally and repeatedly invited to enroll in the MRM Rider and has failed to avail himself of that program.

As explained above, the Company's metering hardware has multiple integrated security measures, and electricity usage information stored in the meter is encrypted. No customer-identifying information, such as names or addresses, is stored in the meters. Importantly, in its collection of electricity usage data, the Company complies with all applicable statutory and regulatory requirements.

II. Complainant's Constitutional Arguments Fail as a Matter of Law

In addition to the Complaint not being supported by the facts related to the Company's collection of electricity usage data, the Complaint's allegations that the utilization of smart meters violates certain provisions of the United States Constitution fail as a matter of law. The substance

⁹ The Company cannot force Mr. McMilion to receive service under the optional MRM Rider. Should he decide not to enroll in that program, once this complaint proceeding has ended, his meter will be exchanged for a smart meter that collects and transmits hourly usage data.

of Mr. McMilion's argument appears to be that the collection of his electricity usage data by the Company constitutes an unreasonable search and seizure without a warrant and does not afford him due process. These assertions are not supported by the law.

First, Complainant's constitutional arguments do not apply to the Company. It is well-settled that "most rights secured by the Constitution are protected only against infringement by governments," and not by private actors.¹⁰ Such includes constitutional protections against unreasonable searches and seizures,¹¹ as well as against violations of due process.¹² As a limited liability company organized under the laws of North Carolina, the Company is a private actor, and no state action is conducted in the Company's collection of its customers' electricity usage data.¹³ In *Benlian*, the installation and utilization of smart meters was mandated by state law, and customers could not opt out. Nevertheless, as the Court in *Benlian* points out, even detailed regulation does not equate to state action,¹⁴ and the Court determined that the provision of

¹⁰ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S. Ct. 2744, 2753, 73 L. Ed. 2d 482 (1982) (citing *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 156 (1978)).

¹¹ See *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 755–56 (2010) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government,' without regard to whether the government actor is investigating crime or performing another function.") (quoting *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-14 (1989)) (emphasis added).

¹² See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982) ("Because a due process violation was alleged and because the Due Process Clause protects individuals only from governmental and not from private action, plaintiffs had to demonstrate that the sale of their goods was accomplished by state action.").

¹³ See *Benlian v. PECO Energy Corp.*, No. CV 15-2128, 2016 WL 3951664, at *7 (E.D. Pa. July 20, 2016) ("The installation of smart meters, and the provision of electricity to customers such as Benlian, is a business activity, and not a state function or a state action.") (*Benlian*).

¹⁴ *Id.* at *6 (citing *Crissman v. Dover Downs Entm't Inc.*, 289 F.3d 231, 243 (3d Cir. 2002); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)).

electricity using smart meters is a business activity and not state action. In this case, there is no state law requiring the installation of smart meters, and customers have the option of enrolling in the MRM Rider under which no interval data is retrieved. It is therefore clear that no state action is conducted in the Company's provision of electricity to its customers, and these constitutional issues are not implicated by the Company's use of smart meters.

Even assuming *arguendo* that the Company were conducting state action in its collection of its customers' electricity usage data, and even assuming *arguendo* that Mr. McMilion does not enroll in the MRM Rider and the Company begins to collect his interval data, such would not constitute an unreasonable search. In *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521 (7th Cir. 2018), the City of Naperville, Illinois, required that its electricity customers receive electric service through a smart meter. The organization "Naperville Smart Meter Awareness" argued that the collection of electricity customers' interval data by this municipality-owned utility—i.e., a state actor—constituted an unreasonable search under the Fourth Amendment of the U.S. Constitution. On appeal, the Seventh Circuit Court of Appeals found that the collection of such data did not constitute an unreasonable search as the City of Naperville's interest in smart meters was significant. The Seventh Circuit reasoned that the modernization of the electrical grid, including the installation of smart meters, was a priority both for the municipality-owned utility and for the federal government:

Smart meters play a crucial role in this transition. For instance, they allow utilities to restore service more quickly when power goes out precisely because they provide energy-consumption data at regular intervals. The meters also permit utilities to offer time-based pricing, an innovation which reduces strain on the grid by encouraging consumers to shift usage away from peak demand periods. In addition, smart meters reduce utilities' labor costs because home visits are needed less frequently.

With these benefits stacked together, the government's interest in smart meters is significant. Smart meters allow utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability.¹⁵

The Company submits that the Seventh Circuit's perspective applies equally to the Company's own interest in deploying smart meter technology: The benefits available from the use of smart meters are substantial, allowing utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability.

There are two significant differences, however, between *Naperville Smart Meter Awareness v. City of Naperville* and the instant proceeding. First, unlike the City of Naperville, the Company is not a state actor, and therefore Complainant's constitutional arguments against the Company fail as a matter of law. Second, as explained above, although Mr. McMilion has refused to enroll in the MRM Rider, the MRM Rider is an alternative available to him under which the Company manually reads the register on the meter display and does not retrieve interval data. Complainant's constitutional arguments therefore also fail on an "as-applied" basis.

Finally, those who seek to invoke the Constitution's due process protections against deprivations of life, liberty, or property must establish that one of these interests is at stake.¹⁶ Complainant does not clearly articulate, much less "establish," which of these interests is at stake in this proceeding, but the Company restates that it is not a state actor and so such concerns are

¹⁵ *Naperville Smart Meter Awareness v. City of Naperville*, 900 F.3d 521, 528-29 (7th Cir. 2018) (internal citations omitted).

¹⁶ See *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake."); *Reno v. Flores*, 507 U.S. 292, 302 (1993) ("Substantive due process analysis must begin with a careful description of the asserted right . . .") (internal citations omitted).

inapposite, and the Company disagrees with the assertion that a utility's collection of its customers' electricity usage deprives anyone of life, liberty, or property without due process of law.

III. Complainant's Statutory Arguments Fail as a Matter of Law

The Complaint's allegations that the utilization of smart meters violates certain sections of the South Carolina Code also fail as a matter of law. The Complaint alleges that the Company's utilization of smart meters violates S.C. Code Ann. §§ 16-17-470 and 16-17-410. By referencing these sections of the S.C. Code, Mr. McMilion appears to argue that the collection of his electricity usage data by the Company constitutes voyeurism, peeping, eavesdropping, and/or conspiracy. These allegations are not supportable.

First, the referenced statutes are criminal statutes and are not jurisdictionally proper before this Commission.¹⁷ Second, these statutory provisions have no applicability to the Company's collection of its customers' electricity usage. South Carolina's law against voyeurism provides that a person "commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy." The law against peeping requires that the accused "peep[] through windows, doors, or other like places"¹⁸ "Eavesdropping," although not defined in the statute, requires that the accused secretly *listen* to or monitor auditory communications.¹⁹ "Conspiracy"

¹⁷ See S.C. Code Ann. § 58-3-140 (enumerating the powers of the Commission to regulate public utilities).

¹⁸ S.C. Code Ann. § 16-17-470(A).

¹⁹ See Black's Law Dictionary (10th ed. 2014).

requires that the accused “combine” with another person to violate the law.²⁰ These do not apply to the Company’s collection of its customers’ electricity usage.

Mr. McMilion’s billing records show that the Company is charging the appropriate tariff rate approved by the Commission for the registered usage, and the Company is otherwise complying with all applicable statutes and regulations. Further, the concerns expressed in the Complaint are supported neither by the facts, nor by the law. For these reasons, the Company requests that the Commission dismiss the Complaint.

CONCLUSION

The Complaint fails to adequately allege that DEC has violated any Commission-jurisdictional statute or regulation. Therefore, this matter should be dismissed.

WHEREFORE, DEC moves the Commission to dismiss the Complaint with prejudice, requests that the Commission hold the filing deadlines for all parties and the hearing date in abeyance pending resolution of this motion, and requests such other relief as the Commission deems just and proper.

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and

²⁰ S.C. Code Ann. § 16-17-410.

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